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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631

IN THE MATTER OF

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Debtor.

ISRAEL A. ABRAMS, ET AL., ETC.,

Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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INDEX.

PAGE

Statement of the matter involved..... 2-8

Questions presented 9

Reasons for the allowance of the writ.....10-11

Brief 12-34

Summary of the Argument.

I. The law announced by the Seventh Circuit that under its bankruptcy powers Congress may substitute administrative bodies as tribunals in lieu of the courts is contrary to the decisions of this court that the constitutional limitations also apply to Congress in the exercise of its bankruptcy powers 13

(a) The bankruptcy power of Congress is subject to constitutional limitations..... 14

(b) The bankruptcy power of Congress is subject to the limitations contained in Sections 1 and 2 of Article III of the Constitution..... 15

(c) Congress did not select the Commission as a tribunal, and it, therefore, had no jurisdiction to pass judicial judgment..... 19

II. The power of the Commission was limited to a determination of the total maximum allowances and no power was conferred upon it to pass on the individual allowances and disallowances..... 20

(a) The intent of the Act was to vest in the Commission the power to fix the total burden of the expenses 20

(b) The Commission recognized the limits of its power as contended by petitioners..... 21

III. The power to fix maximum limits does not embrace the power to fix zero limits..... 22

(a) The word "Nothing" cannot bs stretched to "Maximum" 22

(b) "Maximum" is opposed to "Minimum" and "Nothing" cannot be reconciled with either. 23

IV. The Commission acted arbitrarily and capriciously and it was the duty of the court to examine the evidence and to reject such a report, and the Seventh Circuit erred in upholding its decision on the ground that the Court was powerless to reject the report..... 25

(a) The denial of compensation to the petitioners was arbitrary, and it was the duty of the District Court to sustain the objections and the Seventh Circuit erred in affirming its order 25

(b) The conclusion of the District Court that the report of the Commission was binding upon it no matter how arbitrary it was should have been reversed by the Circuit Court.... 28

(c) The District Court had the entire record for its consideration and it was its duty to pass on the evidence, and the Court of Appeals was mistaken when it said that the record was not before the Court..... 29

(d) If it be true that the District Court did not have any evidence before it, then it was in no position to make any allowances and to overrule the objections..... 30

V. Section 77, as distinguished from 77B authorizes allowances of expenses to parties and fees to their attorneys, regardless of benefits rendered to the estate..... 31

(a) There is no requisite under Section 77 that attorneys representing creditors succeed in their efforts in order to entitle them to compensation 31

(1) The authorities under 77B are inapplicable to Section 77..... 32

(b) The Commission was unable to determine whether the services were of benefit to the estate prior to the approval of the Plan by the District Court, and the District Court was unable to determine such issue prior to the acceptance of the plan by the creditors.. 32

(1) The Commission was unable to pass on the question whether the services of the petitioner were beneficial to the estate prior to the approval of its plan by the District Court 32

(2) The Court was unable to pass on the benefits to the estate until the acceptance of the plan by the creditor..... 34

(3) Parties to the proceedings or those who were let in by intervention are entitled to their expenses and the reasonable fees of their attorneys, regardless of the success of their efforts..... 34

TABLE OF CASES.

American State Public Service Company, In re, 12 Fed. Supp. 667, 678, affirmed 81 F. (2) 721, 727, C. C. A. 4, Certiorari denied 297 U. S. 724 15

Benson v. Crowell, 33 F. (2) 137, Affirmed 45 F. (2) 666, Certiorari allowed (283 U. S. 814), and affirmed (285 U. S. 22) 15, 19, 29

Building Development Company, In re, 98 F. (2) 844, C. C. A. 7 35

Croghan v. Savings Trust Co., 85 S. W. (2) 239, (Missouri, 1935) 23

Crowell v. Benson, 285 U. S. 22, 57 10

Chicago & Northern R. R. Co., In re, 121 F. (2) p. 791 ..... 7, 10, 11, 13

Duparaquet Co. v. Evans, 297 U. S. 216 11

Erie Railroad Company Reorganization, 240 I. C. C. 673 18

Farrell v. Waterman S. S. Co., 291 Fed. 604 15

Grier v. Kenna, 64 F. (2) 605 21

Grocery Center, Inc., In re, 83 F. (2) 617 27

Hall v. Gordon, 119 F. (2) 463 27

Herz, In re, 81 F. (2) 511, 12, C. C. A. 7 28

Louisville Bank v. Radford, 295 U. S. 555 14

Kauhner v. Irving Trust Co., 299 U. S. 445 14

Moweaqua Coal Corp. v. Industrial Commission, 360 Ill. 194 24

Missouri Pacific Railroad Company Reorganization, 212 I. C. C. 662 ..... 17, 21

Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 280 16

National Dept. Stores, In re, 93 F. (2) 123, C. C. A. 3.. 28
New York, New Haven & Hartford Railroad Company Reorganization, 236 I. C. C. 373..... 18
New York Cent. Securities Corp. v. United States, 287 U. S. 12..... 22
Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510, 527.. 30
Silver v. Scuttin Steel Co., 98 F. (2) 503..... 27
Steere v. Baldwin Locomotive Works, 98 F. (2) 889... 32
Teasdale v. Safton Nat. Fibre Can Co., 85 F. (2) 379, 382 (C. C. A. 8)..... 28
U. S. v. Sischo, 262 U. S. 165..... 21
Warner v. Palmer, 312 U. S. 132..... 19

STATUTES CITED.

Section 77 (c) (12)..... 20
Section 47, 28 U. S. C. A..... 12

OTHER CITATION.

Webster's New International Dictionary, 1925 Ed. p. 1333 23

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the United States:

Petitioners, Israel A. Abrams, Sol Abrams, Henrietta Chatiner and Charles J. Rosenbloom (Adjustment Mortgage Bondholders), Meyer Abrams and Bernard Shulman, constituting the law firm of Shulman, Shulman and Abrams (Counsel for said bond owners), pray the issuance of a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit,

whose judgment was rendered on May 20, 1941, and which became final by the denial of a rehearing on June 23, 1941 (121 Fed. (2) 371).

Statement of the Matter Involved.

This petition presents "questions which involve the construction and validity of a statute, and the relative powers of the I. C. C., and the U. S. District Court", which were decided and discussed in the Opinion (R. 149). These questions were considered below in construing § 77(c)(12) involving railroad reorganizations. The gist of the decision is that the I. C. C. (as an administrative agency) may judicially determine and fix allowances and disallowances of expenses and fees, and that its decision, no matter how arbitrary or capricious it was, may not be rejected by the District Courts, and is not subject to review by the Court of Appeals.

MATERIAL FACTS. The Debtor, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, was reorganized in 1928. As a result of that reorganization there was issued, in exchange of certain bonds, 20% in a Fifty-Year Mortgage Bond Issue in the amount of $106,395,096, and 80% in an Adjustment Bond Issue (junior to the Fifty-Year Mortgage) in the amount of $182,873,693 (R. 17). On June 29, 1935, the Debtor invoked the jurisdiction under § 77 by its voluntary petition which was immediately approved. It filed a Plan of Reorganization on July 1, 1935.

Petitioners, Israel A. Abrams, Sol Abrams, Henrietta Chatiner and Charles J. Rosenbloom (owners of Adjustment Mortgage Bonds) were allowed to intervene by the District Court on July 24, 1935 (R. 14), and by the Commerce Commission, on August 3, 1935 (R. 15). They were represented by Meyer Abrams and Bernard Shulman, their counsel, the other Petitioners herein.

Petitioners were active before the District Court and before the Commission. Petitioner Meyer Abrams appeared as counsel before the Commission at the hearings held on August 5, 6 and 7, 1935, and actively participated therein in the examination of witnesses and argument (R. 15). He opposed the Debtor's Plan chiefly because the railroad would have emerged from the reorganization in no better position than it was when the proceedings were invoked. His examination and argument brought out the facts that while the General Mortgage in the amount of $138,788,000 was to remain contingent as to one-third of the interest which was payable from income, if any, such interest was *cumulative and matured in ten years.* A default at the due date would wipe out both the Fifty-Year Mortgage and the Preferred Stock. The Fifty-Year Mortgage contingent for the entire interest, was also "cumulative" and matured in ten years. In the event of a default in the payment of the interest when due, the Preferred Stock (to be given in exchange of the Adjustment Mortgage Bonds) would be completely wiped out (R. 3-7). It was shown that based on the *actual earnings* of the Debtor during the years 1932, 1933 and 1934, there would be a deficiency of approximately $1,500,000 to meet the fixed interest charges under the proposed Plan. On the basis of the average actual earnings during the last three years the Road would have emerged from the reorganization with defaults in the "fixed" charges, regardless of the "contingent" interest, so that immediate foreclosure was possible which would wipe out both the Fifty-Year Mortgage and the new Preferred Stock (R. 3, 4).

At the date of these hearings petitioners were the only representatives of the class of the Adjustment Mortgage Bonds who opposed the Plan on these issues (R. 2-7). The Debtor and the Institutional Groups sponsored the Plan, relying on a prophecy or "forecast" for an increase in

revenues (R. 3). Petitioners also opposed the Plan on the ground that the Trust Deed securing the Adjustment Mortgage Bonds was to be released as a lien and the bonds were to be exchanged for Preferred Stock and the control was to be vested in the sponsors of the Plan who were to remain as the only creditors, under a Voting Trust Scheme whereby they were to select the five Voting Trustees (R. 4, 19).

The evidence also disclosed that the sponsors of the Plan had agreed in advance on the entire Plan and on the personnel of the Voting Trustees before the jurisdiction was invoked.

The same persons who sponsored the Plan as "fair, equitable and feasible" until September, 1937, thereafter confessed that the Plan was not feasible. They admitted that the "cumulative features" in the General Mortgage, as well as in the Fifty-Year Mortgage, had to be eliminated (R. 6) and they sought a continuance of further hearings for the purpose of formulating a different Plan. Further hearings were had before the Commission in September, 1937, wherein appellants participated (R. 4). An Amended Plan was filed on January 10, 1938, which eliminated some of the defects in the Debtor's Plan. Petitioners participated in the hearing before the Commission in February, 1938, on the Amended Plan (R. 8). Petitioners' counsel urged that the Commission should formulate a Plan of its own (R. 5).

The Examiner for the Commission rendered his report, to which petitioners and other creditors filed objections (R. 16-17). The objections were sustained and on February 12, 1940 the Commission adopted a Plan of its own (R. 44). It fixed the capital structure at $548,533,321 and dispensed with the Voting Trust. The Adjustment Mortgage Bondholders were to receive common stock under the Plan.

Feeling themselves aggrieved by the Plan which rele-

gated the position of the Adjustment Mortgage Bondholders from lien creditors to common stockholders they filed objections to the Plan (R. 19). Thereafter, on June 4, 1940, the Commission filed its Supplemental Report where it reinstated the Voting Trust features but gave representation to the Adjustment Mortgage Bondholders to name one of the Trustees (239 I. C. C. p. 485). Petitioners filed further objections to the Plan with the court. Hearings were had before the court for several days, at the conclusion of which petitioners, by their counsel, participated in the oral argument and submitted briefs.*

Prior to the approval of the Plan by the District Court it ordered (R. 11) that petitions for fees and expenses be filed with the Clerk of the Court on or before May 31, 1940 and that copies of the petitions be transmitted by the Clerk to the Commission in order to fix the maximum limits under section 77 (c)(12). Petitioners filed their petition on May 25, 1940 (R. 13-22) and testified before the Commission. Such testimony, according to the opinion (R. 149) "corroborated" the statements contained in the petition. No objections were filed by any of the parties and the testimony was not contradicted. The Commission filed its report fixing the maximum limits at $312,624 (R. 71). Instead of confining itself within the limits of its jurisdiction in fixing the total maximum fees and expenses and of leaving it to the Court to determine the several allowances and disallowances of the petitioners, the Commission passed judicially on the several allowances and disallowances. It disallowed fees and expenses to different parties including the petitioners (R. 69-70) and entered its order accordingly (R. 79) allowing to petitioners "nothing" as a "maximum limit".

* Petitioners prosecuted an appeal from the approval of the plan which appeal is still pending (R. 158).

ISSUES RAISED BEFORE THE COMMISSION. Petitioners filed with the Commission a petition for rehearing or for modification (R. 81) on the grounds: (1) that the Commission was not vested with judicial power to fix and determine the several allowances and disallowances, its jurisdiction being limited to the "fixing" of the total "maximum" limits; (2) if the section be construed as authorizing it to fix the maximum individual fees and expenses the commission was nevertheless powerless to fix the "disallowance" of any fees, which is a judicial function; (3) its report was inconsistent in that while it denied compensation to petitioners on the ground that their services were not beneficial, it allowed compensation to other parties whose services were clearly not beneficial; (4) it overlooked that section 77, unlike section 77B, authorizes the allowance of expenses and fees to "parties" regardless of any benefits to the estate; (5) its finding that petitioners' services did not benefit the estate was contradicted by the record, and that its decision was arbitrary. These points were supported by a Memorandum of Law (R. 87). Points I to III were devoted to a discussion of the legal propositions (R. 87-93), and Point IV (R. 93-101) referred to the record showing that its action was capricious and arbitrary and contrary to the record. The Commission denied the rehearing on November 5, 1940 without any opinion (R. 116).

RULING OF DISTRICT COURT. Petitioners filed objections with the Court founded on the same points on which the petition for rehearing was predicated (R. 103). Objection IV pointed to the record which clearly demonstrated that petitioners performed services which benefited the estate and that the Commission's report was capricious and arbitrary (R. 110-115). The District Court did not pass on the merits of the objections but concluded that it was powerless to reject the

Commission's report, no matter how beneficial the services were to the estate and how arbitrary and capricious the Commission's action was. This is shown by the following (R. 9):

> "Mr. Abrams: I have filed objections to the report supported by a brief, and I would like to argue the objections orally.
>
> The Court: There is no need to argue the objections orally as I have read the objections and the brief and concluded that I have no jurisdiction to allow you any fees due to the report of the Commission.
>
> Mr. Abrams: Do I understand from Your Honor that your ruling is that no matter how much services I have performed and how valuable the services may be you are in no position to allow any compensation in view of the fact that the Commission's Report in fixing the maximum allowances did not allow anything to my clients for their expenses and to our firm for its fees?
>
> The Court: You can read the Statute and that is my interpretation of the Statute and an order will be made overruling your objections to the report."*

RULING OF THE SEVENTH CIRCUIT.

The opinion of the Seventh Circuit quoted the foregoing colloquy between counsel and court (R. 150-1). In justifying and in affirming the action of the District Court, it said (1) that the Commission's findings were binding on the court and (2) that the evidence upon which the finding was had was not before the District Court. A petition for rehearing was filed pointing out the misconception of the court as to the state of the record. The petition for rehearing stated:

> "The opinion states: 'The charge that the Commission, in denying appellants any relief, acted arbitrarily and capriciously, must be rejected in view of the fact found by the Commission that appellants' services were of no value to the estate. The evidence upon which

* The affirmance of the ruling of the District Court cannot be reconciled with another opinion rendered by the same court on June 6, 1941, where it reached the opposite view (*Re Chicago & Northern R. R. Co.*, 121 F. (2) p. 791.

this finding was made was not before the District Court.' This statement is based on a clear misconception of the record. The District Court stated (R. 118): 'Said petitions were submitted to the Court upon the record made and testimony taken before Homer H. Kirby, Examiner for the Interstate Commerce Commission, at Brooklyn, New York, on July 15-19, 1940, which said record and testimony were certified to this Court by said Commission and filed in this proceeding.' The District Court also said: 'The Court, having considered said petitions and the testimony before said Examiner and the entire record in these proceedings.' The stenographic report of the proceedings before the Commission, dealing with the various plans wherein appellants participated, was made a part of the record. This appears in the opinion of the court (36 Fed. Supp. 193, 200-201). * * * The opinion of the District Court also stated (36 F. Supp. 193, 197): 'It was agreed by all parties in interest that all matter of said allowance should be submitted to the court upon the record made before the Commission's examiner, without the taking of any other testimony.' ''

The petition for rehearing further stated:

''In view of this record the statement of the court in its opinion that 'the evidence upon which this finding was made was not before the District Court' is apparently an oversight. The evidence was before the District Court. However, it refused to consider the evidence because of its conception that no matter what the evidence showed, and no matter how much service appellants performed, and 'how valuable the services may be' the court was in no position to do anything about the matter in view of its construction of the statute that it was without jurisdiction to reject the Commission's report. The mere fact that the Commission found that the services were of no value did not warrant the District Court to refuse to pass upon the question whether or not this finding was arbitrary or contrary to the record.''

This petition for rehearing was denied (R. 159).

Questions Presented.

1. Does the power of Congress to deal with bankruptcy carry with it "the right to select the tribunal, even going outside of the courts, to administer debtors' estate" as held by the Seventh Circuit, or are such powers limited by Sections 1 and 2 of Article III and by the Fifth Amendment to the Federal Constitution, as contended by petitioners.

2. May an administrative body be lodged with judicial functions, to the exclusion of the courts, without the right of review no matter how capricious or arbitrary its decision may be?

3. May a reviewing court affirm a decision on the ground that the evidence was not presented to the court below and deny a rehearing when it was clearly shown by the record that such evidence was presented below?

4. Whether the Commission arbitrarily and capriciously denied the expenses and compensation to the petitioners and whether the District Court had no power to reject such finding when the records conclusively demonstrated that there was no basis for the Commission's finding.

5. Does § 77(c)(12) empower the Commission to pass on the separate allowances of the petitioners, or is the jurisdiction confined to the fixing of the total maximum expenses and leaving it to the courts to pass on the individual allowances and disallowances?

6. Whether the power to fix a maximum limit embraces a zero limit and whether the Commission exceeded the limits of its jurisdiction.

7. Does § 77 as distinguished from § 77B or Chapter X authorize compensation to parties who were allowed to intervene and who participated in the proceedings regardless of any benefits resulting to the estate.

Reasons for the Allowance of the Writ.

1. The decision in the instant case that under the bankruptcy power Congress may select administrative bodies as tribunals in lieu of the courts is not in accord with the accepted law in construing constitutional limitations on congressional power. The question presented by this petition is "not the ordinary one as to the propriety of provision for administrative determination". The question is whether Congress may substitute for constitutional courts in which the judicial power is vested, persons appointed for seven years as administrative officers, and completely oust the courts from their judicial functions. The Seventh Circuit placed such a power in Congress. Such a decision would "sap judicial power as it exists under the Federal Constitution and tends" to establish "a government of bureaucratic character alien to our system" (*Crowell* v. *Benson*, 285 U. S. 22, 57).

2. The importance of the questions involved was emphasized in the opinion of the Seventh Circuit. This is the first opinion construing § 77 (c)(12). Not only is the opinion not in harmony with the decisions of various Circuits, but it is not in harmony with another decision rendered by the same Circuit during the same term construing the same section.*

3. The decision upheld the judgment below on the ground that the evidence was not before the District Court, and, therefore, it could not have passed on the question whether the finding of the Commission was arbitrary and capricious.† The decision also held that the finding of the Commission was binding upon the court so that, regardless of the evidence, it was powerless to reject its arbitrary

* See *In re Chicago & North Western R. R. Co.*, 121 F. (2) 791, which was called to its attention by the petition for rehearing (R. 158).

† This was not a collateral attack. The objections were filed in the proceedings which contained the entire record.

report.‡ Such a decision cannot be reconciled with fundamental law, and this court will issue the writ to remove a doubt in the meaning of a statute, and to avoid anomalous encroachments on vested rights (*Duparaquet Co.* v. *Evans*, 297 U. S. 216).

4. The decision that an administrative body may arbitrarily and capriciously adjudicate the rights of the parties and that the courts are powerless to reject such a report cannot be sustained under any theory of law, and the Writ should be awarded to review such a decision.

Prayer for Relief.

WHEREFORE, the above petitioners by their counsel jointly and severally pray the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to the end that its judgment may be reversed, and for such other relief as to this court may seem meet.

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‡ This is contrary to its own decision rendered during the pendency of the petition for rehearing (*Re Chicago & North Western R. R. Co., Supra*).